IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 22/01/2003

CORAM

THE HONOURABLE MR.JUSTICE R.JAYASIMHA BABU
and
THE HONOURABLE MR.JUSTICE N.V.BALASUBRAMANIAN

L.P.A.No.101 of 2000

M/s.United India Insurance Company Ltd.,
by its Divisional Manager, Tuticorin. ... Appellant

-Vs-

1. Muthulakshmi
2. Radhakrishnan
3. M/s.Star Match Factory
a registered partnership
firm by its partner,
R.Selvaraj. ... Respondents.

L.P.A. filed against the judgment and decree dated 19.9.1997 made in A.S.No.712 of 1984 on the file of this Court filed against the judgment and decree dated 27.10.1983 made in O.S.No.51 of 1982 on the file of Sub Court, Srivilliputhur.

!For appellant :: Mr.B.T.Seshadri for Mr.R.Vedantham

^For respondents :: Mr. K.Yamunan for R1 & R2
No appearance for R3.

:JUDGMENT

N.V.BALASUBRAMANIAN,J.

The plaintiff is the appellant. The defendants 1 and 2 are the legal heirs of of one K.R.Raman who carried on the goods transport business in the name and style, Sri Velmurugan Transport at Sattur. The third defendant booked a consignment on 15.6.1979 with the said Sri Velmurugan Transport for transporting certain bundles of matches from Mudukku Meendanpatti village, Sattur taluk to Lalithapur, Maharashtra State. The goods were transported by Sri Velmurugan Transport through its lorry and the lorry on its way to the destination overturned and fell and on account of the heavy impact due to the said fall, the match bundles loaded in the lorry got fire and the entire match bundles were completely burnt. The third defendant who booked the consignment informed the plaintiff of the accident and also gave a notice to the proprietor of Sri Velmurugan Transport claiming the value

of the goods lost in the fire. The proprietor of Sri Velmurugan Transport disowned his liability. Since the goods were insured with the plaintiff by the third defendant under Transit Insurance Scheme, the plaintiff settled the claim of the third defendant by payment of a sum of Rs.75,530/-, being the value of the damages goods on 10.12.1979. The third defendant executed on the same day a letter of Subrogation in favour of the plaintiff and also executed a Special Power of Attorney authorising the plaintiff to take necessary legal proceedings on behalf of it against the proprietor of Sri Velmurugan Transport.

2. The proprietor of Sri Velmurugan Transport, Raman died and his legal representatives were shown as defendants 1 and 2 in the suit along with the owner of the consignment, namely, the third defendant on the ground that the third defendant was colluding with defendants 1 and 2 and evading to join the plaintiff in filing the suit. Hence, the suit was filed for recovery of a sum of Rs.97,106.40 with interest of Rs.75,530/- from the date of plaint till the date of payment.

3. The third defendant remained ex parte in the suit and defendants 1 and 2 contested the matter. The trial Court, after framing necessary issues, found that the accident had occurred due to the negligence of the common carrier and it was only due to the negligence on the part of the driver, the accident had occurred. The trial Court also found that on the basis of the document, viz., the deed of subrogation (Ex.A-12), the suit filed by the plaintiff was maintainable, and accordingly, decreed the suit.

4. Defendants 1 and 2 preferred an appeal before this Court and the learned Single Judge has found that the tyre of the lorry was burst due to the negligence on the part of the carrier as the vehicle was not properly maintained by the carrier. Learned single Judge accordingly confirmed the finding of the trial Court on the question of negligence and held that the accident had occurred due to the negligence of the carrier. Learned Single Judge, however, held that the letter of subrogation did not amount to assignment of policy to clothe the insurer to claim indemnity. Learned Single Judge also held that under Ex.A-12 the right assigned was only a right to sue and not the right in the property and the suit filed by the Insurance Company was not maintainable. Learned Single Judge allowed the appeal holding that the plaintiff has no right to sue in its own name. It is against the judgment and decree, the present appeal has been preferred.

5. We heard Mr.B.T.Seshadri, learned counsel for the appellant and Mr.K.Yamunan, learned counsel for the respondents 1 and 2. Though Mr.K.Yamunan, learned counsel for the respondents submitted that the finding of the learned Single Judge that the loss occurred due to the negligence on the part of the carrier is not sustainable, yet, we find that the trial Court as well as the learned Single Judge of this Court, on appreciation of evidence, has correctly come to the conclusion that the loss occurred due to the negligence on the part of the carrier. Under section 9 of the Carriers Act, 1865, it is for the common carrier to prove that the damage is due to the act of God or alien enemies. The trial Court and the learned Single Judge have found that the common carrier has not proved both the aspects and hence, the liability of the common carrier was not discharged.

6. The decision of the Supreme Court in PATEL ROADWAYS LTD. v. BIRLA YAMAHA LTD. (2000) 4 S.C.C.91) is an authority for the proposition that the liability of a common carrier under the Carriers Act is that of an

insurer, and in the case of claim of damage for loss to or deterioration of goods entrusted to a carrier it is not necessary for the plaintiff to establish negligence and the absolute liability of the carrier is subject to the exception where the loss or damage arises from an act of God. In the instance case, the accident could have been averted by certain amount of foresight of the owner of the common carrier and it is an accident which resulted from the action of the common carrier and the accident cannot be said to be an act of God. Accordingly we confirm the said finding of the learned Single Judge that the accident occurred due to the negligence on the part of the carrier in not properly maintaining the vehicle in question.

7. We are also of the view that the learned Single Judge was correct in his view that Ex.A-12 should be construed only as a letter of subrogation, though in the deed, the word, 'assignment' has been used. We have gone through the document Ex.A-12 and we find that the document does not amount to a letter of assignment as under Ex.A-12 what was transferred was only a right to sue and there was no transfer of interest in the property. In UNION OF INDIA v. SRI SARADA MILLS (AIR 1973 S.C. 281) the Supreme Court has held that under section 6(e) of the Transfer of Property Act, 1882, a bare right of action for claims to damages for breach of contract or claims to damages for tort cannot be transferred because the law does not recognise the transaction which may savour of maintenance of champerty. The Supreme Court also held that when there is only interest in the subject matter, the transaction can be saved from the imputation of maintenance and the interest must exist apart from the assignment and to that extent, must be independent of it. The Supreme Court has held that the subrogation would not give the insurer a right to sue in a court of law in his own name as the subrogation is concerned solely with the mutual rights and liabilities of the parties to the contract of insurance and it confers no rights and imposes no liabilities upon third parties who are strangers to the contract. It is clear that on the facts of the case the goods did not exist on the date of letter of subrogation. Hence, the mere use of the expression, 'assignment of right in the property' in Ex.A-12 does not improve the case of the plaintiff as the goods were not in existence on that date. Learned Single Judge was therefore correct in his view that Ex.A-12 does not assign the policy and under Ex.A-12 only a right to sue was transferred which is prohibited under section 6(e) of the Transport of Property Act.

8. Though we are of the view that the learned Single Judge was correct in his view in the construction of the document Ex.A-12, we hold that the learned Single Judge overlooked the fact that the plaintiff has included the third defendant in the array of parties to the suit and the plaintiff has also claimed in the plaint that the third defendant was impleaded as a party/defendant as it was evading to join the plaintiff as co-plaintiff in filing the suit colluding with the defendants 1 and 2. The Kerala High Court, in a similar circumstance, in NEW INDIA ASSURANCE CO. LTD. v. OKAY TRANSPORT CORPORATION (1991 ACJ 482) noticed the decision of the Supreme Court in Union of India v. Sri Sarada Mills Ltd. (AIR 1973 SC 281), particularly, the following passage to hold that such a suit is maintainable:-

" The defence of the Railway Administration was that the mill realised from the insurance company the damages and 'as such the plaintiff (meaning thereby the respondent mill) has no right to claim any such in this action'. If the specific plea of assignment had been taken in the written

statement the respondent mill would have impleaded the insurance company. The Court could have in those circumstances been in a position to afford full and complete relief to the parties."

We are in respectful agreement with the view expressed by the Kerala High Court. It is axiomatic that the Court has the power to afford full and complete relief to the parties when all parties are before the Court. Though the plaintiff should have impleaded the insured as a co-plaintiff, since the third defendant was not willing to join the insurance company as a co-plaintiff, the plaintiff will be taking a great risk if the the third defendant was impleaded as a co-plaintiff or if the suit was instituted on the power of attorney executed in its favour by the third defendant. The third defendant also remained ex parte in the suit as well as in the appeal before this Court. We are therefore of the view that the Court has the full power to do complete justice between the parties and the defence raised by the defendants 1 and 2 that the insured is not a co-plaintiff is hypertechnical as the insured is before the Court though it figures as one of the defendants. We are of the view that when the Court finds that all the parties who are interested in the suit are before the Court, the Court has the necessary power to mould and grant the necessary reliefs. The third defendant has not disputed that it had received the money from the plaintiff in settlement of its claim, but the act of the third defendant and its unwillingness to participate in the court proceedings show that it would not have joined the plaintiff as coplaintiff. There can be no doubt that the Court has the necessary power to grant a decree in favour of the third defendant and then direct the third defendant to pay the money realised out of execution of the decree to the plaintiff. Since the action of the third defendant establishes that it was unwilling to participate in the court proceedings as a co-plaintiff, we are of the view that the interest of justice would be met by granting a decree in favour of the plaintiff against the defendants 1 and 2.
9. Accordingly, the letters patent appeal stands allowed and the judgment and decree of the learned Single Judge is set aside and the judgment and decree of the trial Court is restored, though not for the reasons stated by the trial Judge in his judgment. Accordingly, there will be a decree in favour of the plaintiff as against the defendants 1 and 2 as prayed for. The appellant succeeds to the above extent. However, in the circumstances, there will be no order as to costs.

Index: Yes
Website: Yes
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To

1. The Subordinate Judge, Srivilliputhur.
2. The Record Keeper, VR.Section, High Court, Madras.

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